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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 559

CHOCTAWHATCHEE ELECTRICAL CO-OPERATIVES, INC., a corporation, *Petitioner,*

v.

RAY E. GREEN, as Comptroller of the State of Florida, *Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION AND MEMORANDUM FOR THE UNITED STATES

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ARGUMENT

1. Review is warranted because the decision below is not in accord with the applicable decisions of this Court

Respondent misconstrues the manner in which petitioner relies upon *Pittman* v. *Home Owners' Loan Corporation*, 308 U.S. 21 (1939), *Federal Land Bank* v. *Crosland*, 261 U.S. 374 (1923), and *Laurens Federal Savings and Loan Ass'n* v. *South Carolina Tax Commission*, 365 U.S. 157 (1961). Petitioner cites these cases only to demonstrate the proposition that "the

fact that the state taxing statute did not require payment of the tax by the lender has 'no determining' significance."

Petitioner claims immunity under Article VI of the Constitution of the United States. There is no need for a statute to *create* immunity for the Rural Electrification Administration since it is a direct activity of the Federal government. On the contrary, it would require specific statutory authority to *permit* state taxation of any kind. The Rural Electrification Act, 7 U.S.C. § 901 *et seq.* is silent in both respects. As this Court stated in *Mayo* v. *The United States*, 319 U.S. 441 (1943),

> "But, where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues."

For a state tax to be inoperative there must be "either a stated immunity created by Congress in the exercise of a Constitutional power or one arising by implication from our Constitution system of dual government" *Esso Standard Oil Company* v. *Evans*, 345 U.S. 495, 499 (1953). *Pittman, Crosland and Laurens, supra*, fall into the former category; the instant case involves Constitutional immunity. There is no need for legislative reenactment of the Constitution.

It is petitioner's position that the decision below is contrary to the reasoning of this Court in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), *Gibbons* v. *Ogden*, 9 Wheat. 1, 210 (1824), and *U. S.* v. *Allegheny County*, 322 U.S. 174 (1944). While the tax in question here is not identical to those exacted in the cases above, the

principle of the supremacy of the Federal Government is no less involved.

Where Federal rights are concerned, as here, this Court is concerned with the *real* nature of the tax and its effects upon these rights. *Society for Savings in the City of Cleveland* v. *Bowers, Tax Commissioner of Ohio*, 349 U.S. 143, 151. *Carpenter* v. *Shaw*, 280 U.S. 363 (1930). Unless clearly sanctioned by Congress this Federal constitutional immunity may not be subject to taxable exactions imposed by the states. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110.

Respondent's reliance upon *Graniteville Mortgage Company* v. *Query*, 283 U.S. 376 is misplaced for two reasons. In the first place, that case did not involve any question of Federal immunity, and secondly, the characterization of the tax in question as an "excise tax," while important to the decision in *Graniteville, supra*, is meaningless in the instant case.

2. This case presents a practical question of substantial and continuing importance which should be decided at this time

It is clear from the Solicitor General's *Memorandum for the United States* that he does not share the respondent's view that "the decision below is clearly correct." If he did agree with respondent this would have provided the most compelling possible reason to oppose the granting of the writ of certiorari.

The Solicitor considers this case to be significant. He speaks of its "*doctrinal importance*" and of the fact that "a decision of that question could potentially be of *great importance* for its implication as to the validity of other kinds of state taxes and in other areas of inter-governmental immunity."

The only objection posed by the Solicitor General is that, in his opinion, the case does not have enough economic importance to warrant review by this Court "until there is a clearer indication of widespread attempts to impose state documentary taxes on transactions with the United States."

The language of the opinion below makes it clear that the Florida Supreme Court recognizes only that immunity from state taxation specifically conferred by Congress. It deems silence in a statute as implied *consent* to the taxation of a transaction with the Federal government. Such silence should be construed to mean that the inherent Constitutional immunity prevails.

If this petition for a writ of certiorari is denied it will undoubtedly be interpreted by the taxing authorities of the states as official toleration if not sanction for taxes of this kind. While petitioner recognizes that a denial of certiorari *normally* imports no expression of opinion by this Court on the merits of a case, a denial here would be read in harmony with the Solicitor General's *Memorandum*. Taken together they would constitute an invitation to the states, hard-pressed for new sources of revenue, to see how far they could go.

As the *Memorandum for the United States* points out, South Carolina already has a virtually identical statute; administrative proceedings are in progress in Pennsylvania over a related type of tax; a total of seven states besides Florida have documentary stamp taxes of one kind or another which, with slight legislative or administrative adjustments, could take advantage of the situation which a denial of certiorari here would seem to create.

Petitioner pointed out in its petition that this case is a class action and that the result will determine the rights of all the REA Cooperatives in Florida.[1]

Thus, a great deal more than $3,000 is directly involved in this case.

The Rural Electrification Administration, of course, is only one of many Federal agencies engaged in making direct loans which could be the subject of similar tax exactions by the states. Confining the discussion to the scope of the REA loan program, the following figures are revealing.

The states mentioned in the Solicitor General's Memorandum are set forth separately and the cumulative total for the United States is given.

State	Total Authorizations Electrification Program[1]	Total Authorizations Telephone Program[2]	Total Authorizations Electrification & Telephone
Alabama	$ 123,865,000	$ 29,774,000	$ 153,639,000
Florida	76,644,000	22,146,000	98,790,000
Maryland	42,188,000	5,656,000	47,844,000
New York	6,228,000	9,008,000	15,236,000
Pennsylvania	49,283,000	25,115,000	74,398,000
South Carolina	93,606,000	20,475,000	114,081,000
West Virginia	1,492,000	12,374,000	13,866,000
Total: U.S.A.	$4,529,249,000	$855,751,000	$5,385,000,000

[1] As of January 31, 1962.
[2] As of December 31, 1961.

[1] As of January 31, 1962 a total of 17 borrowers in Florida had loans approved in the amount of $76,644,202 by the REA Rural Electrification Program. In addition, a total of 10 borrowers had loans approved in the amount of $22,146,000 by the REA Rural Telephone Program. Total approved REA loans in Florida now amount to $98,790,202, upon which the documentary stamp tax totals $98,790.20. (Source: U. S. Dept. of Agriculture, Monthly Statistical Bulletins Electrical Program No. 249, January, 1962, Telephone Program, No. 130, December 1961.

The legislative purpose of the REA programs was clearly stated by Norman M. Clapp, Administrator, before the 1961 regional meetings of the National Rural Cooperative Association,

> "... (W)e must now look to the future security and effectiveness of these systems. We must look not only to the ability of these systems to survive, but also to their effectiveness in doing the job for which they were created—*supplying the rapidly growing demand for electric service* in rural areas on an area coverage basis *at as low a cost as possible*. (emphasis supplied)

In a U. S. Department of Agriculture press release dated January 30, 1962, Mr. Clapp is quoted as saying, "Requirements for electric power in rural areas are doubling every five to seven years."

In a lengthy footnote the Solicitor General apparently felt compelled to explain the seeming inconsistency between his position in the *Laurens* case and here. Indeed, such an explanation is in order in the light of the following language found in his *Memorandum for the United States as Amicus Curiae* in support of the petition in that case,

> "Such taxes impose a substantial burden on the operation of the Federal Home Loan Banks and the Federal Savings and Loan Association and to that extent tend to undermine the Congressional purpose to promote financially-sound low-cost home financing institutions."

The state taxing statute involved in *Laurens* is practically identical to the Florida statute here. The amount in direct controversy in *Laurens* was only $2,270, substantially less than here. If the Solicitor

General felt that this kind of tax imposed a substantial burden less than two years ago it is no less true today. Petitioner respectfully submits that the "constitutional importance" of the case, as the Solicitor puts it, together with its practical economic importance, are compelling reasons why this petition for certiorari should be granted.

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